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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ANDREW JACE,

Defendant and Appellant.

B276074

Los Angeles County
Super. Ct. No. BA424932

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed in part and remanded for resentencing.

Law Offices of Allen G. Weinberg and Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie C. Brennan and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Michael Andrew Jace of the second-degree murder of his wife April,¹ and found true that he discharged a firearm causing her death. He appeals, arguing the prosecutor committed misconduct by misstating the law of voluntary manslaughter. We affirm Jace’s conviction but remand for the trial court to exercise its discretion whether to strike the imposed firearm enhancement.

BACKGROUND

An information filed August 15, 2014 charged Jace with the murder of April on May 19, 2014 (Pen. Code,² § 187, subd. (a)) and alleged he personally used a firearm causing great bodily injury and death (§ 12022.53, subds. (b)-(d)).

At trial, testimony established Jace and April were married with two young sons. When Jace shot and killed April on May 19, 2014, C. was five years old and N. was eight. April had an older son from a previous marriage, Savoy, and Jace also had an older son from a previous marriage. April worked in the financial aid office of a university; Jace had been unemployed for six years.

Kenneth Brown knew Jace through church and worked with him on the television show *The Shield*. Before May 19, 2014, Jace “always” asked Brown to pray for his marriage, which was suffering because of Jace’s extended unemployment and the couple’s finances. A few weeks before April’s death, Brown learned during a church security team training that Jace had a gun in the house (which had belonged to April’s father). On

¹ We refer to the victim by her first name. (Cal. Rules of Court, rule 8.90(b)(4).)

² All subsequent statutory references are to the Penal Code.

May 14, five days before Jace killed April, Jace texted Brown that his marriage was a mess.

On May 18, 2014, Savoy and April's adult nephew Christopher came over to the couple's house, went out to a movie with April, and then stayed overnight. The morning of May 19, Christopher woke up to hear Jace yelling: "[Y]ou don't have a godly reason for a divorce." The yelling continued for four to five minutes, and Christopher heard two crashes. Savoy grabbed a baseball bat and came out of the bedroom. Christopher followed him, and saw a vase smashed on the floor, an ironing board knocked over, and Jace and April standing by the dining room table. Jace tried to get Savoy to give him the bat, but Savoy backed away toward the kitchen. April asked Christopher to get the bat, and Christopher grabbed the bat from Savoy. Jace said repeatedly: "I would never put my hands on your mom." About 15 minutes later, and before 8:00 a.m., April left, with Christopher and Savoy, to drive C. and N. to school.

April texted Jace's friend Brown to ask him to check on Jace. Brown texted Jace: "When trouble comes, be full of joy[.]" and Jace answered: "'May be too late. April wants out and I'm tired of pleading.'" Brown invited Jace over to watch a game that night but Jace declined. Jace also texted: "'She'll accept it or we'll move on[.]'" and "'if she isn't who I thought she was according to God, a lot changes but she'll get what she wants, a way out.'" That evening at almost 6 p.m., Brown renewed his invitation to Jace, who texted back: "'Appreciate it but shit is going to hell fast and I wouldn't be good company.'" Brown asked if Jace was staying at the house, and Jace responded: "'Leaving tonight.'"

Jace also exchanged texts with his friend Evan, who invited Jace over at about 4:45 p.m. Jace never showed up.

Jace sent 95 texts to April on the day she was killed, and she responded to many, for a total of 164 texts between 9:43 a.m. and 8:12 p.m. April texted Jace at about 10:45 a.m.: “ ‘I don’t want u throwing things and breaking things and screaming lies to the boys. I am afraid to come home. I am glad u are praying.’ ” Jace texted: “ ‘I can vacate the premises for the night. Just give me a time & I’ll leave[,]’ ” adding that his biggest mistake was “ ‘being involved with a woman who isn’t submitted to God.’ ” He asked April: “ ‘What time should I leave by?’ ” She responded that she would bring the boys home after a game.

That afternoon, Jace texted April: “ ‘You’ve thrown me under the bus April & you are walking out on the boys.’ ” Jace accused April of being involved with another man, which she denied. He texted: “ ‘I’m just amazed at how comfortable of [*sic*] “woman of God” just walks out of a marriage.’ ” April responded: “ ‘[S]top throwing the Bible at me.’ ” At around 4:00 p.m. she urged Jace to go to N.’s baseball game: “ ‘He is going to be so sad without u and probably won’t even want to play. If it’s easier I won’t go. . . . Please don’t not go because ur upset with me. Please.’ ”

April texted Jace that C. hurt his arm and she was going to his school to pick him up. Jace texted he was walking, and “ ‘we both know we’re not talking tonight.’ ” At 4:54 p.m., Jace responded, “ ‘[y]es’ ” when April asked if he was on the road. April and Jace continued to text about their marriage, and at around 6:45 p.m. she apologized “ ‘that I’m not the perfect Christian woman u thought u married.’ ” He told April he was still walking and had been drinking, and was “ ‘trying to find

[the] key Evan hid for me. . . . I'll text after I'm inside.' ”

At around 7:40 p.m. Jace texted that he had been praying and “ ‘drinking since 10 maybe 11,’ ” and at 7:44 p.m. Jace reminded April the boys needed to give the dog food and water before going to school. Jace texted April: “ ‘Evan said hello not that it really matters[,]’ ” and “ ‘The tongue has the power of life and death.’ ” April texted Jace at 8:04: “ ‘U should go to sleep. We'll talk tomorrow.’ ” At 8:12 p.m., April's last text described N.'s performance at the baseball game, adding: “ ‘Looks like he had fun.’ ”

Jace's cell phone was disconnected from the network from 8:06 p.m. until 8:23 p.m. Cellular tower evidence showed his phone remained near his and April's home, not near Evan's home.

N., who was ten years old at the time of trial, testified that when April, C., and N. arrived home from the baseball game, Jace was standing in the dining room. April sat down in the dining room and C. climbed into her lap. After N. and C. went to their shared bedroom, N. saw Jace pull April by her arm into the hallway, where she fell to the floor. “And then my dad said, ‘If you like running, then run to heaven.’ And then he shot her.” N. heard two gunshots. Jace shot April in her legs and back; one bullet entered her middle back and came out on the right side of her chest. April died of multiple gunshot wounds.

At 8:23 p.m., Jace texted April's stepfather Carlos: “ ‘Come get the boys, I just shot April.’ ” Carlos and April's mother Kay jumped into the car to drive to April's home. Carlos called 911 and told the operator about Jace's text, and that April and Jace had been arguing.

Jace called 911 at 8:31, reporting a shooting before disconnecting the call. The 911 operator contacted the paramedics and called Jace's number. He answered and said, "I shot my wife[,] the weapon was on the table by the door, and he was nowhere near it. Jace said he wanted paramedics, "because my intent was not to kill her." The 911 operator instructed him to step outside with his phone, and the call ended with Jace directing the officers to the hallway.

Los Angeles Police Department Officer Joseph Villagran was called to April and Jace's home at 8:36 p.m., and found Jace standing in the doorway talking on his cell phone. Jace said: " 'I shot one round and I don't know what happened.' " Officer Villagran entered the house and found April lying on her back in the hallway. He placed Jace under arrest.

Two police detectives interviewed Jace at the police station the next day. (One of the detectives testified, and the jury heard an audio recording of the interview.) Jace, who did not appear drunk and did not smell of alcohol, said he had gotten upset about the texts he and April exchanged during N.'s baseball game. He thought they had turned a corner financially, but April had decided not to try to work it out. He "was just . . . in so much pain" that "I just wanted her to feel some pain." April was a runner, so he shot her in the legs.

Jace said he had been drinking, and was holding the gun when April came home with the boys. The gun had belonged to April's father, and was already loaded. Jace and April sat down at the table, sent the kids to their room, and then April lunged at him. "There was a knife. I don't remember if it was on the table[,] and Jace wasn't sure if April had anything in her hands when she lunged at him. (The police did not find a knife on any

table.) He pushed April away, “[a]nd as I was pushing, I—I shot the first shot[,]” not knowing where he hit April. April fell, and he fired into her legs. “[A]ll [I] had intended to do was shoot her in the leg.” He may have shot the gun two or three times. Before he shot her, he had “never laid a finger” on April: “We were happy except for the money.” Jace said, “I didn’t have the courage to—to kill myself . . . I didn’t mean to kill her.”

A few days after he killed April, Jace called her brother Carlo from jail. Carlo testified and the jury heard a recording of the call. Jace told Carlo “it was an accident,” and he was probably a little drunk. The gun had been for himself, not April. Jace wasn’t trying to kill April. He said, “I was in so much pain, because I knew she was going to leave me, that I wanted her to be in pain . . . like I was in pain. . . . I wanted her to lose something, which was track.” Carlo explained to the jury that April was an outstanding runner on a track team.

At the close of the prosecution’s case, Jace made a section 1118.1 motion, arguing insufficient evidence showed that Jace premeditated before he shot April. The trial court denied the motion. The court also expressed doubts that sufficient evidence supported the giving of a voluntary manslaughter instruction (“I don’t see that this is a heat of passion situation.”), but decided to give the instruction. Jace stated he would not testify, and the defense rested.

The jury convicted Jace of second degree murder with the intentional and personal discharge of a firearm causing death. The trial court sentenced Jace to 15 years to life for second degree murder and a consecutive 25-year sentence for the firearm enhancement, for a total of 40 years to life.

DISCUSSION

Jace has forfeited his argument that the prosecutor committed misconduct in rebuttal closing argument

Jace contends the prosecutor committed misconduct in his rebuttal closing argument by misstating the law of voluntary manslaughter to the jury.

The prosecutor argued in closing that Jace committed premeditated and deliberate first degree murder when he shot and killed April. April's killing would be voluntary manslaughter only if Jace "acted rashly and under the influence of the intense emotions that obscured his reasoning or judgment, and the provocation would have caused a person of average disposition to act rashly and without due deliberation." The prosecutor contended the evidence did not support a finding that Jace acted rashly and in the heat of passion.

Jace's counsel argued the prosecutor was "overselling" the case by arguing first degree murder, because the evidence did not show that Jace planned the killing. Instead, when April told him she wanted a divorce, "when you feel like you're going to lose your wife, when you feel like you're going to lose your kids, you lose your mind." "If that's not enough provocation, folks, I don't know what is. . . . If losing your family is not, I don't know what is." "[I]f you find provocation and if you feel that that provocation created some kind of passion in him . . . that's manslaughter."

In rebuttal, the prosecutor repeated that the evidence showed the premeditation and deliberation required for first degree murder, and summarized the voluntary manslaughter instruction:³ "One, the defendant was provoked. Two, as a result

³ The trial court instructed the jury: "[P]rovocation may reduce a murder from first degree to second degree and may

of the provocation, the defendant acted rashly and under the influence of intense emotion [that] obscured his reasoning or judgment. And number three, and the provocation would have caused the person of average disposition to act rashly and without deliberation, that is, from passion rather than judgment. . . . [T]he defendant must have acted under the direct and immediate influence of provocation as has been defined.” The prosecutor continued: “And what’s important in the voluntary manslaughter is that the provocation would have caused the person of average disposition to act rashly. . . . [T]he entire law is based on reasonable person’s standard.”

The prosecutor then made the statements Jace identifies as misconduct: “[I]f you believe it is reasonable for a man who believes that he is going to have to face a divorce to pick up a gun, lie about where he’s going to be . . . and shoot his wife in the back . . . in front of the kids. . . . And the reason counsel says he snapped is because she’s asking for a divorce.” She added: “It’s a reasonable person’s standard. There is no reasonable person that would react to a divorce in such a fashion.” The prosecutor urged the jury to go back and read the instructions.

reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide.” Voluntary manslaughter required that the defendant was provoked, as a result acted rashly and under the influence of intense emotion, and “the provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. . . . [C]onsider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.”

Jace did not object at trial. “[A] claim of prosecutorial misconduct is not preserved for appeal if [a] defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury.’” (*People v. Tully* (2012) 54 Cal.4th 952, 1010.) In this case, an objection to a misstatement of the law, and an admonition to the jury correcting the misstatement, would have cured any injury. “The trial court immediately could have corrected misleading or inaccurate statements of the law and could have warned the prosecutor not to repeat them.” (*People v. Najera* (2006) 138 Cal.App.4th 212, 224.) Jace has forfeited his appellate claim of prosecutorial misconduct.

Even if Jace had preserved this claim, we would reject it because the statements were harmless.

Manslaughter is a lesser included offense of murder, and heat of passion is a mental state that precludes the formation of malice, reducing an unlawful killing from murder to manslaughter. (*People v. Beltran* (2013) 56 Cal.4th 935, 942.) “Heat of passion arises if, ‘ “at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.” ’ ” (*Ibid.*) The question is whether the provocation would cause a reasonable person to “*react* in a certain way: with his reason and judgment obscured,” not “whether the average person would *act* in a certain way: to kill.” (*Id.* at p. 949.) The prosecutor’s statement that no reasonable person would react to the prospect of divorce by lying, picking up a gun, and shooting his wife in the back improperly told the jury to focus on whether a reasonable

person would act the way Jace acted, rather than on whether a reasonable person would react with his reason and judgment overborne. The prosecutor misstated the law.

Here, however, that misstatement was harmless. First, although the prosecutor's challenged statement was incorrect, the prosecutor stated the correct standard a number of times. Second, the prosecutor referred the jury to the instructions, which correctly stated the law. Third, the jury was instructed that the prosecutor's statements were not the law and the jury should follow its instructions if the attorneys made statements that conflicted. We presume that the jurors followed their instructions rather than the prosecutor's argument. (*People v. Osband* (1996) 13 Cal.4th 622, 717.) "Therefore, there was not 'a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' " (*People v. Peau* (2015) 236 Cal.App.4th 823, 834.) We therefore also reject Jace's claim that his counsel rendered ineffective assistance when he failed to object to the prosecutor's statement or seek an admonition. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.)

We add that the evidence overwhelmingly supported the conclusion that when Jace shot and killed April he acted with malice, and not in reaction to provocation sufficient to make a reasonable person act rashly and without reflection or judgment. On the morning of the day he killed April, Jace argued with April about the divorce. After April left to take the boys to school and to go to work, Jace told April he would leave the house before she returned home. He texted April he was walking to his friend Evan's house and looking for the key, and he relayed a message from Evan, but he never left the couple's home as he told April he

would. Instead, when April arrived home that night with their sons, Jace was waiting for them, holding the gun. With the boys watching from their bedroom, he shot and killed April, telling her “if you like running, then run to heaven.” Jace told the detectives he fired the first shot, and then after April fell, he intentionally shot April in the legs so, as a talented runner, she would feel some of his pain. This was compelling evidence that Jace acted with the malice required for second degree murder. “Given the strong evidence supporting defendant’s murder conviction and the comparatively weak evidence of any legally adequate provocation, a different result was not reasonably probable.” (*People v. Beltran, supra*, 56 Cal.4th at p. 957.) We affirm Jace’s conviction.

Jace received a term of 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), consecutive to his sentence of 15 years to life for second degree murder. In supplemental briefing, Jace argues that remand is necessary to allow the trial court to exercise the discretion conferred under Senate Bill (SB) No. 620, effective January 1, 2018, to strike the section 12022.53 firearm enhancement. Respondent concedes that SB No. 620 applies retroactively to defendants like Jace, whose sentences are not yet final on appeal, and that remand is necessary. We therefore remand to allow the trial court to decide in the first instance whether to strike the firearm enhancement.

DISPOSITION

The matter is remanded for the limited purpose of allowing the trial court to consider whether to strike the firearm enhancement imposed under Penal Code section 12022.53. In all other respects, the judgment is affirmed.

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EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.